

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 09 March 2006

BALCA Case No.: 2005-INA-00057
ETA Case No.: P2002-CA-09537067

In the Matter of:

GOODMAN PROPERTIES, INC.,
Employer,

on behalf of

CUTBERTO RUIZ-SOSA,
Alien.

Appearance: Walter Burrier, Esquire
Santa Ana, California
For the Employer

Certifying Officer: Martin Rios
San Francisco, California

Before: **Burke, Chapman and, Vittone**¹
Administrative Law Judges

DECISION AND ORDER

PER CURIAM: This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer (CO) of alien labor certification for the position of Landscaping and Groundskeeping Worker.² The CO denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26.

¹ Associate Chief Administrative Law Judge Thomas M. Burke did not participate in this matter.

² Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). This application was filed prior to the effective date of the "PERM" regulations. See 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record

STATEMENT OF THE CASE

On April 10, 2001, Employer, Goodman Properties, Inc., filed an application for labor certification to enable the Alien, Cutberto Ruiz-Sosa, to fill the position of “Landscape Gardener.” (AF 25). The position required two years of experience, and the job duties were presented as follows:

Plant and design maintenance of gardens and lawns. Familiar with trees, shrubbery and the use of different fertilizers and weed killers. Prepare and grade terrain, apply fertilizer, seed and sod lawns. Transplant shrubs and plants. Perform landscaping operations and maintain grounds and landscape of private business residences. Plan lawns and plants and cultivate them. Locate and plant shrubs, trees, and flowers selected by property owner or those recommended for particular landscape effect. Mow and trim lawns and shrubs by using hand and power mower. Clean grounds by using rakes, brooms and hoses. Spray trees and shrubs, and apply supplemental liquid and dry nutrients to lawns and trees.

(AF 25).

On July 20, 2004, the CO issued a Notice of Findings, (NOF), proposing to deny certification because a U.S. applicant was rejected for other than lawful job-related reasons. (AF 21). Thus, while Employer claimed that this applicant’s resume did not indicate any experience as a landscape gardener, his resume showed that he appeared at least potentially qualified for the job opportunity as, in addition to meeting with customers, the applicant had planned gardens, repaired sprinklers, and prepared grounds for planting. The CO found that Employer should have invited this applicant for an interview to further discuss his qualifications. Employer was advised that it needed to provide rebuttal that discussed the applicant’s work history as owner of a gardening company and as a landscape gardener for two other employers, and demonstrating that even considering this experience, he did not meet the job requirements listed on the ETA 750A.

Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file (AF) and any written arguments. 20 C.F.R. § 656.27(c).

Employer submitted rebuttal on July 29, 2004, in which Employer's owner explained that he would like to amend or rephrase the words "any experience" in reference to the applicant's qualifications. (AF 8). Employer's owner indicated that he did in fact try to contact this applicant by mail and that Employer made a mistake in not explaining this previously. A receipt for certified mail was provided as was the explanation that the applicant did not show up for an interview or return the employment application letter he was requested to complete. Therefore, he was deemed unavailable. Included with rebuttal was a letter dated November 4, 2002, addressed to the applicant and requesting that he complete and sign the enclosed application for employment and bring it with him to the interview scheduled for November 8, 2002. Also included were a certified mail receipt and a copy of the returned envelope received by Employer, with the notation by the U.S. Postal Service that the applicant was "not living here." (AF 14).

On August 9, 2004, the CO issued a Final Determination (FD), denying certification. (AF 6). The CO pointed out that in its recruitment letter, Employer had argued that this applicant's resume should not even have been forwarded to Employer, as his resume showed no experience as a landscape gardener. In its rebuttal, Employer relied on a different ground for rejecting this application, contending that it had made an attempt to contact this applicant and he never appeared for the interview. As proof, Employer provided a copy of the returned letter, which established that this applicant never actually received the letter. The CO determined that Employer provided no evidence of any follow-up attempts to reach this applicant even though his resume included a telephone number and an e-mail address. The CO concluded that Employer had failed to make a good faith effort to contact this potentially qualified applicant. According to the CO, Employer remained in violation of 20 C.F.R. § 656.21(b)(6), having failed to provide a lawful, job-related reason for rejecting this U.S. applicant.

On August 30, 2004, Employer filed a request for review of this case. (AF 3). By letter dated September 28, 2004, Employer was advised that its request for reconsideration was being denied. (AF 5). This matter was then forwarded to the Board of Alien Labor Certification Appeals for formal review. The Board docketed the case on October 22, 2004.

DISCUSSION

In its request for review, Employer expressed its belief that the U.S. applicant in question “exceed [sic] the job description,” and that his stated objective and experience showed that he sought a managerial position rather than a position as a landscape gardener. (AF 3). Employer argued that this applicant was looking for a position as a “nursery worker sales” and that Employer was convinced that the applicant did not meet Employer’s “goal standard within the job description.” Employer further claimed that this applicant only had twenty months of verifiable experience in the job offered, while Employer sought twenty-four months. Finally, Employer contends that its attempt to contact this applicant by certified mail constituted good faith recruitment, regardless of the fact that the applicant never received the letter. We disagree.

The resume of the U. S. applicant in question established that he had a wide range of experience and had worked on landscape/gardening crews and been a leadworker. He stated that he was looking for a landscape/gardener position, a groundskeeper position, or nursery worker/sales position. His resume listed experience from May 1986 to April 1987, and December 1987 to September 1988 as a landscape/gardener, from September 1988 to January 1989 as a leadworker/driver, and from 1989 to present as owner of his own gardening company. His resume clearly indicated he had sufficient qualifications and experience to warrant an interview.

An employer who seeks to hire an alien for a job opening must demonstrate that it has first made a “good faith” effort to fill the position with a U.S. worker. *H.C. LaMarche Ent., Inc.*, 1987-INA-607 (Oct. 27, 1988). Employer has the burden of production and persuasion on the issue of lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.*, 1987-INA-161 (Dec. 7, 1988) (*en banc*).

Here, Employer has raised varying arguments at different stages regarding its rejection of the U.S. applicant. One is that the applicant was overqualified or seeking a management position, an argument which is not supported by the “Objective” listed by this applicant in his resume. Just as an employer cannot reject an applicant because of its “unfounded speculation that the applicant would have used the job as a stepping-stone,” *Switch, U.S.A., Inc.*, 1988-INA-

164 (Apr. 19, 1989) (*en banc*), or because an applicant would not commit beyond six months, *World Bazaar*, 1988-INA-54 (June 14, 1989) (*en banc*), Employer cannot reject this applicant based on its unfounded conjecture that he did not want the position. The fact that this applicant's resume specifically detailed over two years of experience as a landscape gardener and lists those very skills and qualifications Employer claims he lacks, also renders the credibility of Employer's assertions doubtful.

Finally, Employer's failure to make any attempt to contact this applicant once its letter to the applicant had been returned, despite the fact that the resume listed alternative means of contact via telephone and e-mail, renders its claim of good faith recruitment unpersuasive. *See Bruce A. Fjeld*, 1988-INA-333 (May 26, 1989) (*en banc*). Given the totality of the facts of this case, we conclude that the CO properly determined that this applicant was rejected for other than lawful, job-related reasons. Therefore, labor certification is denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.